SAMUEL et al. *v.* HUNTER'S EX'X.

March 21, 1918.

[95 S. E. 399.]

1. **Appeal and Error (§ 907 (2)*)—Failure of Record to Disclose Offered Testimony—Presumption.**—Declarations of testatrix having been offered to show that she could not have known of alleged will, it will be assumed the declarations would have tended to show such fact; the record not showing what the declarations were.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 611.]

2. **Wills (§ 297 (1)*)—Contest on Ground of Forgery—Declarations of Testatrix—Admissibility.**—In a contest over the genuineness of a will, where there is independent evidence tending to show that the will is a forgery, declarations of alleged testatrix, showing knowledge or lack of knowledge of the existence of such will, are proper evidence as circumstances to strengthen or weaken the assault.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 776.]

Error to Circuit Court of City of Norfolk.

Proceedings by Mrs. Lydia A. Howe for the probate of the will of Newtie E. Hunter, deceased. The clerk of the circuit court admitted the will to probate, and Rosa S. Samuel and others appealed to the circuit court. Upon an issue devisavit vel non, there was a verdict and judgment in favor of proponent, and contestants bring error. Reversed and remanded for new trial.

R. R. Hicks, of Norfolk, for plaintiffs in error.

N. T. Green, of Norfolk, for defendant in error.

KELLY, J. A writing purporting to be the will of Newtie E. Hunter, an elderly maiden lady, who resided in Norfolk and died there in 1914, was admitted to probate by the clerk of the circuit court of that city. Rosa S. Samuel and others, claiming to be the heirs at law of the alleged testatrix, appealed to the circuit court from the clerk's order of probate. Upon an issue devisavit vel non, made up and tried in that court, there was a verdict and judgment in favor of the proponent, Mrs. Lydia A. Howe, the executrix and chief beneficiary under the will. Thereupon the contestants brought the case here for review.

The will was attacked upon the sole ground that it was not genuine, but had been forged through the procurement of Mrs. Howe. Miss Hunter's testamentary capacity was unquestioned, and it was not claimed that any undue influence had been

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

exercised over her. At the trial the contestants offered a witness to prove certain statements of the testatrix, made subsequent to the date of the alleged will, accompanying the offer with the following avowal by counsel:

"I expect to show, by this witness, she, two weeks prior to her death, stated that she was going to leave her property to her heirs, or those who were near to her, and that she at that time, from the character of the language she used, could not have known of this will. Everything she said was contrary to the terms of the will at that time."

The only specific objection made to the testimony thus proffered was that it did "not show undue influence." That question was not involved. The record in the case, and the oral and printed arguments of counsel in this court, clearly indicate that the trial court rejected this evidence on the ground that it could not be received for any purpose in a case involving merely the genuineness of the will. This ruling is assigned as error.

[1,2] The record does not show what the alleged declarations of the testatrix were, and we must assume from the avowal that they were such as would have tended to show that she "could not have known of this will." The contention of counsel for plaintiffs in error is that, in a contest over the genuineness of a will, where there is independent evidence (as there is in this case) tending to show that the writing is a forgery, the declarations of the alleged testatrix, showing knowledge or lack of knowledge of the existence of such a will, are material as circumstances for the consideration of the jury.

The question thus presented does not seem to have been judicially determined in this state, but has been frequently passed upon in other jurisdictions. The authorities are not in accord upon the subject, but we are of opinion that the rule supported by the better reason and authority is that such declarations, standing alone, are not admissible as direct evidence to prove or disprove the genuineness of the will, but that, in all cases where its genuineness has been assailed by other proper evidence, the declarations are admissible as circumstances, either to strengthen or to weaken the assault, according to their inconsistency or their harmony with the existence or terms of the will. This is the settled rule in England, and it is well supported by authority in this country. Doe *v.* Palmer, 16 Q. B. 747, 15 Jur. 836; 1 Wigmore on Ev. § 112; 3 Wigmore on Ev. § 1735; State *v.* Ready, 78 N. J. Law, 599, 75 Atl. 564, 28 L. R. A. (N. S.) 240; Hoppe *v.* Byers, 60 d. 381; Johnson *v.* Brown, 51 Tex. 65; Swope *v.* Donnelly, 190 Pa. 417, 42 Atl. 882, 70 Am. St. Rep. 637; Freeman's note, 107 Am. St. Rep. 460-462.

We shall not review at length the authorities which we have cited. A satisfactory summary of the result of our investigation of this question is well expressed in the following quotation from Swope *v.* Donnelly, supra:

"In all of these cases it was said, in effect, that the proof of declarations was not in itself sufficient either to establish the execution of the will or to overcome the testimony of the subscribing witnesses, and that it was admissible only for the purpose of corroboration. In the opinion in Hoppe *v.* Byers, 60 Md. 381, it was said: 'But in thus sustaining the ruling excepted to, it must be distinctly understood that we hold that such declarations would not be admissible if they stood alone, and had not been preceded by direct proof of witnesses to the genuineness of the handwriting. They are not to be taken as direct proof to establish the paper, but merely as corroborative of such direct proof, or as a circumstance in a case of this character, where such direct evidence has been first given, proper for the consideration of the jury.' At the best, this is a dangerous class of testimony, and its admission should be carefully guarded, and its effect as corroborative only should be clearly defined."

In the instant case, it is true, the alleged declarations were offered in evidence in advance of the other proof tending to show forgery, but counsel for the proponent made no point of this, either in the court below or in this court. The mere order of proof is not usually material, and was not so in this case.

The leading case against the admissibility of evidence of the kind here in question, and the case chiefly relied upon by defendant in error, is Throckmorton *v.* Holt, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663. The majority opinion in that case was prepared by Mr. Justice Peckham, and evinces much consideration and research. The value of the opinion, however, as a precedent, is impaired, not only by what we think the unsatisfactory reasoning upon which it is based, but by the fact that Mr. Justice (now Chief Justice) White, Mr. Justice Harlan, and Mr. Justice McKenna dissented upon the point now before us, and Mr. Justice Brown concurred only in the result. Furthermore, the decision has been seriously criticised and questioned by very high authority. In State *v.* Ready, supra, Gummere, Chief Justice of the Court of Errors and Appeals of New Jersey, delivering the opinion, reviewed the cases cited by Mr. Justice Peckham and reached the conclusion that they do not support the principal case.

A note to § 1735 of volume 3, Wigmore on Evidence, refers to the opinion in Throckmorton *v.* Holt as "making the surprising statement that the 'weight of authority' is against the admissibility of the evidence in question;" and again, in the same

work (volume 5, in a note to § 112), the following comment appears:

"The only case ever intimating the contrary seems to be Throckmorton *v.* Holt, U. S., cited post, § 1734, note 2. In State *v.* Ready, supra, the learned Chief Justice's statement that on this rule 'judicial sentiment is altogether out of harmony,' and 'courts are divided,' is comprehensible only as an expression of delicate consideration for the federal Supreme Court's lonesome decision of Throckmorton *v.* Holt; for the fact seems to be that Throckmorton *v.* Holt is the only case ever decided to the contrary, and the present opinion itself points out the inadequacy of the citations in Throckmorton *v.* Holt to sustain its decision."

Counsel for the proponent cite the case of Wallen *v.* Wallen, 107 Va. 131, 57 S. E. 596, to show that this court has approved the rule as announced in Throckmorton *v.* Holt; but no such effect can be ascribed to the former case. In Wallen *v.* Wallen, Judge Keith said:

"The principle established seems to be that the declarations of the testator are admissible to show his mental condition or capacity, as well as his feelings and affection, but are inadmissible as proof of the substantive fact of undue influence."

And he cites Throckmorton *v.* Holt to sustain his statement of the law. There is no conflict between the conclusion reached by Judge Keith in Wallen *v.* Wallen and that which we have arrived at in the present case; indeed, the rule that declarations of a testator are not admissible to prove the substantive fact of undue influence, but are admissible to show the testator's mental condition, is entirely in harmony with the rule herein approved, that such declarations are not admissible to prove the substantive fact of forgery, but are admissible as showing the state of mind of the testator and his plan and intent, as being consistent or inconsistent with a will, the genuineness of which is called in question by other proper evidence.

In our opinion it was error to exclude the testimony offered on behalf of the contestants.

We have carefully considered all the other assignments of error in the case, and are of opinion that they afford no ground for reversal, and require no further discussion.

For the error in excluding evidence, as pointed out above, the judgment must be reversed, and the cause remanded for a new trial.

Reversed.

Note.

Declarations of Testator as Evidence—Fraud, Forgery or Undue Influence.—The keynote of the decisions involving the admissibility of declarations of a testator where a will is contested on the ground

of fraud, forgery, undue influence and perhaps other grounds is the subtle judicial distinction that the evidence is incompetent to show the substantive fact involved but is receivable to show the testator's state of mind. The impediment to the reception of such declarations is, of course, the hearsay rule. But it is generally conceded that such declarations are of importance and they are admitted under the exception to the hearsay rule which permits declarations as to mental state or condition to be received, because the declarations are primary evidence of the declarant's state of mind. And this is the origin of the statement in the principal case that such declarations are only admissible after independent evidence in corroboration or rebuttal, that is to either impeach or sustain the will. For example, having shown by other evidence that undue influence was exercised, it is competent to show the nature and extent of such influence by the effect upon the testator's mind as evidenced by his declarations.

According to Prof. Wigmore's explanation, there is a double inferential process in applying the evidence thus limited. We reason from the fact of the testator's utterance that he has or has not made a will or a will of a certain tenor to the fact of the testator's belief in such a state of affairs. And from the fact of the testator's belief we infer the truth of the facts believed, because obviously a testator does or should know of the existence or contents of will made by him or else he is insane or incompetent to make a will. The first link in the chain is the weakest, since the testator knowing the truth may not speak it, i. e. may have no belief in his statements because they are intentionally false for some purpose, such as deceiving expectant relatives in order to pass his remaining days in peace. 3 Wigmore on Evidence, p. 2236, § 1736. See the same reasoning in Chamberlayne's Modern Law of Evidence, vol. 4, p. 3612, § 2649.

The opinion of Chief Justice Cockburn in the famous case of Sugden *v.* St. Leonards, L. R. 1 P. D. 154, 225, reasons that the testator has exceptional or peculiar means of knowledge of the contents of his will and, except in the rare cases where he seeks to mislead others, has no motive to speak otherwise than the truth and that, therefore, such declarations should be received as evidence of the contents of the will as a special exception to the hearsay rule. Some courts have seized upon this language to establish a special independent exception to the hearsay rule with uncertain limits.

The cases involving forgery are rare, the usual type being an aged testator, a confidential relationship, and a will drawn by the adviser standing in such relationship (sometimes a lawyer, it is to be regretted) making the draughtsman executor and principal beneficiary, with a host of disappointed kinsfolk in the background alleging undue influence and testator's ignorance of the contents of any will leaving his property to others contrary to his statements and promises to them. The cases cited in the principal case are chiefly upon undue influence, but in many cases inseparable from fraud and from lack of mental capacity. The principles involved are very similar. For a birds-eye view of the subject, see 3 Wigmore on Evidence, §§ 1734-1740, pp. 2232-2246.

Hoppe *v.* Byers, relied on in the principal case, was cited with approval in Tinman *v.* Fitzpatrick (Md. 1913), 87 Atl. 802, 806, on the point that the testator's declarations are not to be taken as direct but only as corroborative proof to establish the execution of an alleged will.

Throckmorton *v.* Holt, criticized in the principal case, and by Prof. Wigmore in the note quoted, has been quoted with approval in Lipp-

hard *v.* Humphrey, 209 U. S. 264, 52 L. Ed. 783, 28 Sup. Ct. 561, 14 Am. Cas. 872, where the rule was reiterated that declarations were only admissible as part of the res gestae or on the issue of testamentary capacity.

Of Throckmorton *v.* Holt, it is said in 3 Jones Com. on Ev., p. 359, § 484, "With all the respect that is due to this decision, it must be noted that such lawyers as Mr. Justice White and Mr. Justice McKenna dissented from it, and in the face of the authorities cited, while it has undoubtedly affected the preponderance, it may not be taken as having so materially lessened it as to have finally adjusted the balance. It does not outweigh the clear expression of Cockburn, C. J., in Sugden's Case."

Referring to Sugden *v.* St. Leonards, it is said in Chamberlayne's Modern Law of Evidence, vol. 4, p. 3628, § 2654 that, "The English rule on this point seems to embody the correct principle, that wherever an unsworn statement is relevant as evidence of the facts asserted in it and its use is bound to be reasonably necessary to proof of the proponent's case, it should be received as secondary evidence for the purpose."

Although the opinion in Sugden *v.* St. Leonards was by a majority only it is firmly established as law in England.

The following cases have been selected as useful and illustrative.

In addition to the Virginia Case of Wallen *v.* Wallen, may be cited Montague *v.* Allen's Executors, 78 Va. 592, where undue influence and mental incapacity were alleged by contestants, and it appeared that testatrix signed the will without having it read to her, but it was held that her knowledge of the will could be established by her declarations and as well by circumstantial evidence, that her dispositions were in accord with her affections, that her will referred to marks on her pictures which she declared she placed thereon for the purpose of disposing of them, that she acknowledged the paper as her will after its execution and that it remained in her possession until her death.

In Forney *v.* Ferrell, 4 W. Va. 729, where a will was attacked on the ground of undue influence, it was held that the trial court properly admitted in evidence subsequent declarations of the testatrix, in conversations with her husband, tending to show that she did not know or recollect accurately the contents of the will. On the other hand in LaRue *v.* Lee, 63 W. Va. 388, 60 S. E. 388, the trial court's exclusion of evidence of subsequent conduct and declarations of the testator manifesting his ignorance of the existence of the will was held proper. In that case the court said: "This will is in testamentary form, and was duly proved to be wholly in the handwriting of the testator and signed by him." The will was attacked on the ground that certain alterations and interlineations worked a revocation of the will and because lack of testamentary intent was disclosed, but both of these contentions were decided adversely by the court. The case illustrates the rule that such evidence is never competent to impeach the will directly but only to show the mental state of the testator. Manifestly the case involved no question of forgery or imposition upon the testator and, the will being holographic, the testator's mental state, aside from testamentary capacity, was utterly irrelevant.

Canada's Appeal from Probate, 47 Conn. 450, is an interesting case. The testator executed a will one year before the will presented for probate. The first will left nothing to the testator's son, the last one made the son sole executor and gave the entire estate to him.

The will was contested on the ground of fraud, undue influence, and lack of mental capacity. The testimony took a wide range. The court admitted both prior and subsequent declarations of the testator, with the qualification that the more remote declarations should have less weight, to show the state of feelings of the testator towards his son, on the question of undue influence. Subsequent declarations of the testator were also admitted for the purpose of showing that he did not understand that he had executed the second will. In order to show the mental state and feelings of the testator towards his son the court admitted declarations of the testator that his son had turned him out of doors, compelled him to sleep in outbuildings, and had refused to assist him in taking care of his cattle in severe weather, the testator being then over ninety years of age. On appeal, it was held error to refuse to permit the son to show in support of the will that such charges were untrue. The court also held admissible a petition in chancery signed by the testator and a decree in such chancery suit in favor of the testator for the recovery of certain land the deed to which was procured from the testator to the son's wife by the fraud of the son, but limited the purpose of such record to proof of the fact of litigation and feelings of the testator and not to show the truth of the facts as alleged.

In Shailer *v.* Bumstead, 99 Mass. 112 (a leading case), where a will was contested on the ground of fraud, undue influence, and testatrix's ignorance of its contents, and a former will had made a different disposition of her property, the court held that as to the second will, subsequent declarations as well as contemporaneous or prior declarations were competent to show the state of mind of the testatrix on the question of fraud or undue influence, and ignorance of the will, the weight of the declarations depending upon their significance and proximity or remoteness in point of time, and the exclusion of such evidence was held erroneous, stating that the truth or falsity of such statements was of no consequence, since the narration was not received as evidence of the facts stated but only as showing the declarant's mental acts or conduct, and that especially were subsequent declarations not admissible to establish the fact of fraud or undue influence in issue. The court also held that subsequent declarations of the testatrix expressing dissatisfaction with or want of knowledge of the contents of the will were competent to rebut the presumption of the free execution of the will arising from the fact that it remained unrevoked for some time after its execution. This case expresses the universal doctrine that where undue influence is alleged testator's declarations are competent because the fact in issue is the testator's mental condition at the time of making his will, of which subsequent declarations as well as prior declarations are direct and primary evidence.

In Credille *v.* Credille, 123 Ga. 73, 51 S. E. 628, 107 Am. St. Rep. 157, 161, on a petition to set aside the probate of a will on the ground of want of testamentary capacity, undue influence, and fraud in the factum of signing the instrument probated, where contestants offered in evidence various declarations made by the testator after the execution of the paper purporting to be a will to the effect that he had not made a will; that he never made a will in his life, and that he understood that there was what was supposed to be a will he had made in G., and that he wanted the person to whom the declaration was made to bear witness that if he, the testator, had signed such a paper he didn't know what he was doing, the court held, in line with the language of the principal case, that: "These declarations were

admissible, not as evidence of the facts which they purported to declare, nor as evidence that any fraud was practiced upon the testator, or any undue influence exercised over him, nor as evidence of a revocation of any will that he might have made, but as tending to show the state of his mind when the paper purporting to be his will was executed and whether he then had sufficient capacity to make a will, or was then in such a mental condition as to be easily and unduly influenced by another."

In Goodbar *v.* Lidikey, 136 Ind. 1, 43 Am. St. Rep. 296, the court held that the declarations of a testator, not made in connection with the execution of the will, were inadmissible to show that it was procured by undue influence, but that such evidence was admissible in rebuttal to show testator's intentions as to the disposition of his property and prove that there was no undue influence. In other words the declarations were not competent to prove exercise of undue influence but only to show the mental condition of the testator and the nature and effect of such influence upon him, after the undue influence had been otherwise established.

While subsequent declarations of a testator are admissible to show the extent and effect of the undue influence claimed to have been exercised of him, such declarations alone can not be sufficient to overturn the will. In re Hess's Will, 48 Minn. 504, 31 Am. St. Rep. 665. And this is the general rule. See note in 31 Am. St. Rep. 690, and cases cited.

In Patton *v.* Allison, 26 Tenn. (7 Humph.) 320, a will was contested on the ground of fraud and undue influence because it was drawn by the testator's brother who was a joint executor and principal beneficiary therein. The admissibility of the testator's prior declarations showing knowledge of its contents was conceded, but the case was reversed because the trial court instructed the jury that the testator's prior declarations in conformity with the will would not be sufficient evidence of his knowledge and approval of its contents, the court saying that if the charge was abstract it was erroneous and such declarations would certainly be satisfactory evidence in a proper case, and if the charge referred to the declarations in the case at bar then it was erroneous as trenching upon the province of the jury as to the sufficiency of the evidence presented.

In the case of In re Murphy's Will, 37 N. Y. S. 223, where contestants alleged fraud and undue influence of the principal beneficiary and claimed that the testatrix, who was unable to read or write, had no knowledge of the contents of the will, and the sole surviving attesting witness testified that the deceased attesting witness, an attorney, whose signature was proved, read the will to testatrix who declared that it was "all right," the surrogate held that testatrix's knowledge of the will was sufficiently proven.

Where a will was contested because the testatrix was illiterate and, her husband being both draughtsman and principal beneficiary, on the ground of undue influence and lack of knowledge of its contents, the court held that testatrix's declarations before the execution of the will that she wanted her husband and not her relatives to have her land and subsequent declarations that she had made her will leaving her property to her husband were competent to show knowledge and approval of the contents of the will. Maxwell *v.* Hill, 89 Tenn. 584. 15 S. W. 253, 256.

Where a will leaving a large proportion of testatrix's estate to her attorney, who drew the will under her directions, and appointing him executor, was contested on the ground of undue influence,

it was held that declarations of testatrix that she had made a will and remembered certain persons, and that she had thought a good deal about making the will, and that some people would not be satisfied, were admissible to show that she was aware of the contents of the will. In re Cooper's Will, 75 N. J. Eq. (5 Buch.) 177, 71 Atl. 676, affirmed in 76 N. J. Eq. 614, 75 Atl. 1100, mem. op.

In Reel *v.* Reel, 1 Hawks. (N. C.) 247, 9 Am. Dec. 632, subsequent declarations of a testator were admitted to the effect that he thought the provisions of the will to be different from what they were. This case has been criticised and distinguished on the ground that the evidence might have been considered competent on the point of undue influence in view of the evidence that testator's mind was impaired by intemperate habits. See Notes in 3 Am. Dec. 395, 397; 9 Am. Dec. 636.

In Fleming *v.* Morrison, 187 Mass. 120, 72 N. E. 491, 105 Am. St. Rep. 386, probate of a will was refused on proof by one of the attesting witnesses that the testator told him that the instrument was a fake will made for the purpose of inducing the chief beneficiary to sleep with him, thus showing that the animus testandi did not exist and the will was not acknowledged before each of three witnesses as required by statute in Massachusetts, there being only two other witnesses to the will.

C. E. S., JR.